The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?

Douglas H. Ginsburg* and Hyland Hunt**

In an adversarial system the prosecutor serves a dual function: he is supposed to be at once an advocate and a neutral minister of justice. Our judicial system has long placed before the prosecutor, in the words of the United States Supreme Court, the "twofold aim . . . that guilt shall not escape or innocence suffer."[1] To the first end, he is required to "prosecute with earnestness and vigor," and because of the second the Court cautions that "he may strike hard blows, [but] he is not at liberty to strike foul ones."[2] It may be difficult, of course, for a prosecutor to draw the line between hard blows and foul ones, and so over time the legal profession has developed rules governing a prosecutor's pre-trial obligation to avoid a wrongful conviction.

In recent years, the legal profession in the United States has begun to extend those rules into the post-conviction setting and to delineate the contours of a prosecutor's ethical obligation to remedy a wrongful—or a possibly wrongful—conviction. The American Bar Association first adopted a model rule for post-conviction conduct in 2008.[3] Wisconsin became the first (and only) state to adopt the rule in 2009; New York adopted a similar rule in 2006, but no other state has yet done so.[4] In the absence of such guidance, prosecutors' offices across the country have taken widely divergent approaches to post-conviction claims of innocence.

This essay will address the changing nature of the prosecutor's ethical obligations after conviction. Our focus will be upon the prosecutor's ethical obligation to support reopening a conviction based upon newly available evidence. We will examine three alternative models for deciding whether a conviction should

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* Judge, United States Court of Appeals for the District of Columbia Circuit. Judge Ginsburg gratefully acknowledges the research assistance of his law clerk, David K. Kessler.

** J.D. 2008, University of Michigan Law School.

1 Berger v. United States, 295 U.S. 78, 88 (1935).

2 *Id.*

3 Stephen A. Saltzburg, *Changes to Model Rules Impact Prosecutors*, CRIM. JUST., Spring 2008, at 1.

4 Order, In the Matter of Amendment of Supreme Court Rules Chapter 20, Rules of Professional Conduct for Attorneys, No. 08-24 (Wis. 2009), *available at* http://www.wicourts.gov/sc/rulhear/DisplayDocument.html?content=html&seqNo=36849; *see also* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 56 n. 91 (2009).

be reopened and suggest the best model relieves the prosecutor of all responsibility for that decision and therefore of the need to play a problematic dual role. We also suggest a framework by which a prosecutor who is required to be both advocate and arbiter should approach post-conviction decisions.

I. THE PROBLEM OF WRONGFUL CONVICTION

We turn first to the nature of the problem. In the United States, interest in the prosecutor's ethical obligation after conviction has been spurred recently by the large number of exonerations based upon DNA evidence—252 so far in the United States alone.[5] But this phenomenon is not unique to the United States; there have been at least eight DNA-based exonerations in Canada[6] and two in the United Kingdom.[7] The most recent exoneration in the United Kingdom led the Criminal Cases Review Commission, a neutral body that determines which convictions should be reconsidered in the light of new evidence, to ask the Crown Prosecution Service in March of 2009 to undertake a general review of cases in which testable forensic evidence is available.[8] Australia, too, is struggling with how best to address post-conviction claims based upon DNA evidence. The Australian Law Reform Commission has recommended that Australia require the long-term retention of forensic material and establish a process to consider applications for post-conviction review;[9] the government referred those recommendations to two advisory panels in 2005 but thus far has taken no concrete action.[10] The DNA database recently established in Israel will surely give rise to similar demands to reopen some convictions for which biological evidence has been preserved.[11] In South Africa, where the Parliament is considering a law that will greatly expand its

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[5] The Innocence Project, http://www.innocenceproject.org (last visited Apr. 15, 2010).

[6] Barry Scheck, *Closing Remarks*, 23 CARDOZO L. REV. 899, 900 (2002) (noting eight DNA exonerations in Canada as of 2002).

[7] Andy McFarlane, *DNA Doubt Cast over Other Murders*, BBC NEWS, Mar. 18, 2009, http://news.bbc.co.uk/2/hi/uk_news/7946777.stm.

[8] *Id.*

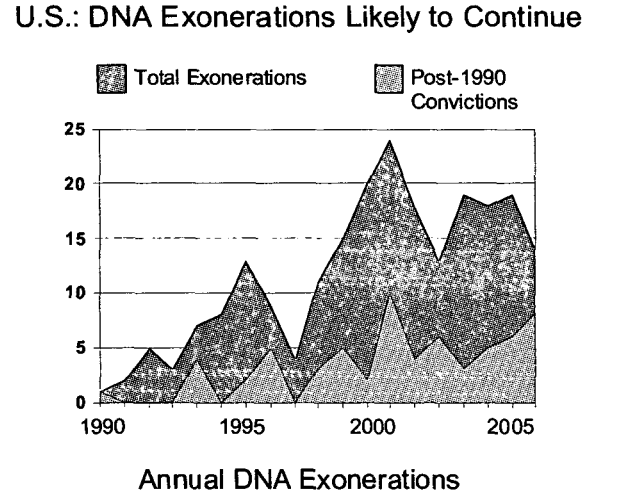
[9] AUSTRALIAN LAW REFORM COMM'N, REPORT NO. 96, ESSENTIALLY YOURS: THE PROTECTION OF HUMAN GENETIC INFORMATION, ch. 45, recommendation 45-1 (2003), *available at* http://www.austlii.edu.au/au/other/alrc/publications/reports/96/.

[10] ATT'Y GEN. DEP'T, FULL AUSTRALIAN GOV'T RESPONSE, Dec. 9, 2005, http://www.alrc.gov.au/inquiries/title/alrc96/agd.htm; *see also* Lynne Weathered, *Does Australia Need a Specific Institution to Correct Wrongful Convictions?*, 40 AUSTL. & N.Z. J. CRIMINOLOGY 179, 188–89 (2007).

[11] Shahar Ilan, *The Case for the DNA Database*, HAARETZ, July 13, 2008, *available at* http://www.haaretz.co.il/hasen/spages/997014.html.

DNA database, proponents note that the database can protect the innocent as well as detect the guilty.[12]

DNA-based exonerations may have peaked in the United States because DNA testing is now routinely done before trial. Exonerations likely will continue, albeit at a lesser rate, as the technology of testing continues to improve. Indeed, about twenty-five percent of the first 211 exonerees were convicted after the advent of DNA testing[13] and in almost forty percent of those cases, DNA testing technology had advanced since the trial.[14]



Sources: Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1657 (2008); www.innocenceproject.org

The recent spate of exonerations has prompted new attention to how the criminal justice system should respond to post-conviction claims of actual innocence, whether based upon DNA evidence or upon other newly available information. We will focus upon DNA because it can establish innocence so conclusively that it places in sharp relief the issues prosecutors face in responding

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[12] Kanina Foss, *The Signatures of Innocence and Guilt*, THE STAR, Apr. 28, 2009, at 22 (noting the exonerations due to DNA in the United States). In the United States, newly tested DNA evidence matched a profile in the DNA database in 49 of the first 200 exonerations. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 118–19 (2008).

[13] Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1656 (2008) (finding 55 of the first 211 exonerees "were convicted even though DNA testing was available at the time of their trials").

[14] *Id.* at 1658.

to post-conviction claims of innocence. Reforms in countries with adversarial systems have followed three primary models: (1) casting the post-conviction prosecutor as a neutral minister of justice; (2) expanding post-conviction adversarial proceedings; and (3) departing significantly from the adversarial model. The prosecutor plays some role in each of these models, but we will focus more attention upon the first, in which the primary locus of post-conviction decision-making is the prosecutor's office. We do so in order to highlight the problems inherent in casting the prosecutor as a neutral minister of justice.

We will suggest that, because of the tension inherent in asking the prosecutor to be both a zealous advocate and a neutral minister of justice, the other models provide more appropriate ways of evaluating claims of innocence.

II. THE PROSECUTOR'S OBLIGATION TO DISCLOSE OR INVESTIGATE NEW EVIDENCE

We turn first to the prosecutor's obligation to investigate new evidence after conviction. Examining the analogous duty to disclose evidence before conviction, we contend that institutional incentives and cognitive biases make it difficult for a prosecutor to fulfill that obligation and that it likely becomes more difficult following conviction. We then examine factors a prosecutor might consider when determining whether he is obligated to disclose or investigate new evidence after conviction.

A. *The Pre-Conviction Analogue*

Before conviction a prosecutor must, in the words of one American legal scholar, forgo "conduct that would increase the likelihood of obtaining a conviction in favor of conduct that will increase the likelihood of obtaining justice."[15] One of the most prominent ways in which the prosecutor must subordinate advocacy to justice is in fulfilling his duty to disclose information to the defense. In the United States, ethical rules require the prosecutor to make timely disclosure of all information "known to the prosecutor" that "tends to negate the guilt of the accused or mitigates the offense."[16] This ethical obligation is in part also a legal one; as a matter of constitutional due process, the prosecutor must disclose all exculpatory information that is also material, meaning there is a reasonable probability the result will be different if the evidence is disclosed.[17]

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[15] Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1346 (2004).

[16] MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009).

[17] *See* United States v. Bagley, 473 U.S. 667, 682 (1985) ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); Brady v. Maryland, 373 U.S. 83, 87 (1963).

The due process obligation covers information held by the police as well—even if it is unknown to the prosecutor.[18]

In recognition of the pressure prosecutors face because of their dual responsibilities,[19] states increasingly have adopted less restrictive discovery regimes under which criminal defendants are legally entitled to more expansive discovery than *Brady v. Maryland* requires.[20] That, however, is a less than complete solution to the problem. Rules requiring the disclosure of specific types of information in addition to all "exculpatory" information still place upon the prosecutor the obligation to determine what is and is not to be turned over.[21] Even a prosecutor subject to open-file discovery rules may be authorized to withhold some information as privileged—for example, to prevent witness intimidation—although the prosecutor's privilege analysis is subject to court approval in some states.[22] Finally, even a prosecutor with an open-file policy may—through

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[18] Kyles v. Whitley, 514 U.S. 419, 437–38 (1995); *see also* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 577–78 (2002).

[19] In North Carolina, for example, discovery reform was initiated after a capital murder trial in which prosecutors did not disclose evidence that the victim had been seen alive after the date on which the defendant was alleged to have killed him. Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 264, 272 (2008).

[20] *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1623 (2005) ("In contrast to federal constitutional and statutory requirements, more than forty states require that exculpatory evidence be disclosed to defendants at some point before trial. Nearly half of the states . . . require pretrial disclosure of witness names, addresses, and prior statements . . . ."). Arizona and Florida allow criminal defendants to depose government witnesses, and in some cases people who are not scheduled to appear as witnesses, in preparation for trial. *See* ARIZ. R. CRIM. P. 15.3; FLA. R. CRIM. P. 3.220(h). In North Carolina, "the prosecution is responsible for providing the defense, not only with the material that it has in its file, but also with relevant materials in the files of law enforcement agencies, which it may never have seen or possessed." Mosteller, *supra* note 19, at 275.

[21] A large number of state statutes list categories of items that the prosecutor is expected to disclose. *See, e.g.*, ARK. R. CRIM. P. 17.1(a) (six specific categories); CONN. GEN. STAT. ANN. § 54-86a (West 2009) (four specific categories); WIS. STAT. ANN. § 971.23 (West Supp. 2009) (nine specific categories); *see also* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 586 (noting that "even in jurisdictions that have endorsed broader discovery," most discovery schemes define mandatory disclosure "in terms of narrow categories").

[22] *See, e.g.*, ILL. COMP. STAT. ANN. 412(j) (West 2004) ("Matters Not Subject to Disclosure" include an "informant's identity . . . [if] his identity is a prosecution secret" and evidence the disclosure of which would "involve[ ] a substantial risk of grave prejudice to national security" so long as "failure to disclose will not infringe the constitutional rights of the accused"); MINN. R. CRIM. P. 9.01, subd. 3(2) ("[I]nformation relative to . . . witnesses . . . shall not be subject to disclosure if the prosecuting attorney files a written certificate with the trial court that to do so may endanger the integrity of a continuing investigation or subject such witnesses or persons or others to physical harm or coercion . . . ."); NEB. REV. STAT. ANN. § 29-1912(4) (LexisNexis 2004) ("Whenever the prosecuting attorney believes that the granting of an order [of discovery] . . . will result in the

negligence—fail to disclose exculpatory information, or, through the malfeasance of others, fail to disclose information known only to another state agency, such as the police.[23]

Experience in the United States shows it is difficult for a prosecutor to fulfill simultaneous roles as a zealous advocate and as a neutral minister of justice. For example, even in last year's high-profile prosecution of United States Senator Ted Stevens, the prosecutors repeatedly withheld information from the defense, including notes indicating one of the Government's key witnesses had no recollection of an inculpatory conversation he later described on the witness stand.[24] The trial court eventually quashed the conviction and will likely sanction the prosecutors, a consequence that has prompted the Justice Department to order all federal prosecutors to undergo additional training regarding their obligation to disclose exculpatory information to the defense.[25] Furthermore, there is evidence that the problem is systemic: one study of over 11,000 murder convictions from 1963 to 1999 found that convictions were reversed because the prosecutor failed to disclose material evidence or presented false evidence in more than three percent of the cases[26]—and that, obviously, does not account for the cases in which such a deviation may have gone undetected.

B. *The Inherent Conflict*

We think it unlikely that prosecutors everywhere are brazenly disregarding their obligations. Institutional disincentives, however, reduce the probability that the prosecutor acts as a truly neutral minister of justice—particularly with respect to post-conviction claims. The institutional focus of a prosecutor's office is upon

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possibility of bodily harm to witnesses or that witnesses will be coerced, the court may permit him or her to make such a showing in the form of a written statement to be inspected by the court alone."). Most states also allow exceptions for any material considered attorney work product. *See, e.g.*, ME. R. CRIM. P. 16(b)(3); OKLA. STAT. ANN. tit. 22, § 2002(E)(3) (West 2003).

[23] There are many examples of prosecutorial negligence. *See, e.g.*, United States v. Diabate, 90 F. Supp. 2d 140, 144 (D. Mass. 2000) (government's failure to turn over exculpatory evidence after promising open-file discovery was one example in its "dismal history" of "'concerted indolence'" in handling discovery matters); State v. Schwantes, 314 N.W.2d 243, 244–45 (Minn. 1982) (discussing prosecutor's plausibly "inadvertent" violation of open file discovery by a failure to disclose report to defense counsel after defense counsel had already copied the file); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 461 (2001) ("The *Brady* case law is filled with examples of defendants who received 'open file' discovery from well-meaning, but negligent prosecutors.").

[24] Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 8, 2009, at A1, A14.

[25] Charlie Savage, *Elite Unit's Problems Pose Test for Attorney General*, N.Y. TIMES, May 8, 2009, at A20.

[26] ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 131 (2007).

closing current cases, not reevaluating old ones, and the time and resources devoted to the latter task necessarily take away from the former.[27] Prosecutors also may face a political climate that responds favorably to a "tough on crime" message and thereby discourages the prosecutor from devoting resources to anything but the pursuit of new convictions.[28] Finally, there may be institutional resistance to the very idea that the system is far more fallible than we thought. Wrongful convictions pose a challenge to the integrity of the entire adversarial process, which values highly just the types of evidence exonerations have called into doubt, including eyewitness identifications and confessions.[29] Prosecutors have a vested interest in maintaining public confidence that the system produces reliable results. Indeed, in the United States, exonerations have already served to undermine support for capital punishment.[30]

Cognitive bias may also make it difficult for a prosecutor to evaluate fairly whether a piece of evidence is indeed exculpatory.[31] For example, one should expect a prosecutor to overvalue evidence that supports the defendant's guilt and discount evidence that tends to undermine that conclusion.[32] John Grisham's non-fiction book, *The Innocent Man*, recounts just such a case. Also, the prosecutor may be unaware that a possible defense theory could be bolstered in some non-obvious way by a particular piece of evidence that, though seemingly insignificant by itself, reveals a pattern or otherwise takes on significance in context—what the intelligence community calls the "mosaic" problem.[33]

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[27] *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132–37, 148–50 (2004).

[28] *See id.* at 153–54.

[29] In a study of the first 200 DNA-based exonerations, Brandon Garrett found thirty-one of the exonerees had confessed. Garrett, *supra* note 12, at 88. In eighteen of those cases the defendant was either a juvenile, mentally disabled, or both. *Id.* at 89.

[30] For example, in 2000, then-Governor George Ryan imposed a moratorium on all executions in Illinois because of what he called the "shameful record of convicting innocent people and putting them on death row." Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1; *see also* Ralph Blumenthal, *After Hiatus, States Set Wave of Executions*, N.Y. TIMES, May 3, 2008, at A1 (noting decline in public support for capital punishment, which some advocates attribute in part to exonerations).

[31] *See* Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 516–18 (2007).

[32] *Id.* at 517–18. This phenomenon is known as selective information processing. *Id.* at 517. Other types of cognitive bias contribute to the inability of a prosecutor to evaluate evidence from a neutral perspective. For example, confirmation bias "leads individuals to seek out and prefer information that tends to confirm whatever hypothesis they are testing"—i.e., that the defendant is guilty. *Id.* at 516–17. Belief perseverance leads an individual to "adhere to [his] beliefs even when the evidence that initially supported the belief is proven to be incorrect." *Id.* at 518.

[33] *See* McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983) ("Due to the mosaic-like nature of intelligence gathering, for example, [w]hat may seem trivial to the uninformed[ ] may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in context.") (internal citations and quotation marks omitted); Ahmed v. Obama, 613 F.

One Israeli defense attorney expressed the difficulty facing the prosecutor who tries to determine whether to withhold evidence as privileged this way: "It's like wearing a double hat. First, I have to value the evidence for the prosecution . . . and then I have to value the same evidence as if I were the defense attorney."[34] That same tension inheres after conviction, when cognitive bias likely looms even larger because the prosecutor's belief in the defendant's guilt has been reinforced by the jury.[35]

Although these institutional and cognitive problems with casting the prosecutor as a neutral minister of justice persist, and perhaps even increase, after conviction, a prosecutor has even greater discretion at that stage. First, as discussed below, fewer legal rules cabin the prosecutor's discretion after conviction. Second, there is no consensus and little guidance regarding the extent of a prosecutor's ethical obligation after conviction, and a robust adversarial system for deciding factual questions may no longer be available.[36] Often the prosecutor is, as a practical matter, the sole arbiter of whether a defendant has access to potentially exculpatory material, including DNA, and the prosecutor's support or opposition may make or break the defendant's chance at exoneration through whatever procedure remains available, such as executive clemency.[37]

In recognition of the plight of a wrongfully convicted defendant, some commentators have suggested that after conviction the prosecutor abandon

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Supp. 2d 51, 55 (D.D.C. 2009) ("[The Government's] theory is that each of these allegations—and even the individual pieces of evidence supporting these allegations—should not be examined in isolation. Rather, [it believes] '[t]he probity of any single piece of evidence should be evaluated based on the evidence as a whole,' to determine whether, when considered 'as a whole,' the evidence supporting these allegations comes together to create a 'mosaic' that shows the Petitioner to be justifiably detained."); Prosser, *supra* note 21, at 569 ("This problem [of determining when something is exculpatory] is compounded by the fact that prosecutors cannot always know what the value of evidence might be to the defense. They may have no experience in thinking strategically from a defense point of view and they may lack knowledge about how the evidence in question could corroborate the defendant's version of events.").

[34] Peter Raven-Hansen, Panel Report, *National Security Secrecy in the Courts: A Comparative Perspective from Israel and Ireland*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 63, 69 (2006) (statement of Ami Kobo, Deputy Nat'l Defender of Israel).

[35] *See, e.g.*, Burke, *supra* note 31, at 518–20; Medwed, *supra* note 27, at 138–50.

[36] *See* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 502 (2009) ("After a conviction . . . there is minimal post-conviction process available to which the prosecutor may defer on the question of whether an injustice was done. The prosecutor, not the judge or jury, is the key fact finder."); Medwed, *supra* note 4, at 56 (noting that even Model Rule 3.8 "may remain too vague to operate effectively in practice"); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 173 (2005) ("Prosecutorial discretion is at its height in the postconviction context because legislators and professional code drafters have not focused on postconviction issues.").

[37] Medwed, *supra* note 4, at 37.

altogether his adversarial posture and act entirely as a neutral minister of justice.[38] As we have seen, however, discarding the adversarial posture is easier said than done. In adopting its new Model Rule, the ABA itself recognized that prosecutors "have institutional disincentives to comport with" post-conviction obligations.[39] When we ask the prosecutor to wear the hat of a neutral minister of justice, we ask him to play a role that is in considerable tension with his role as a zealous advocate; it is no wonder if he sometimes fails.

Of course, the difficulty of the task does not absolve the prosecutor of the obligation to act ethically and, despite the cautionary note we have sounded, the data indicate we should not be too disheartened about the capacity of prosecutors to do justice. In his study of the first 200 DNA-based exonerees in the United States, Brandon Garrett found that "in twenty-two cases (12%) police or prosecutors or the FBI initiated the DNA testing."[40] Garrett further found:

> Many exonerees faced difficulties obtaining access to DNA testing absent willing cooperation of law enforcement. In at least seventy-one out of 200 exonerations (36%), the exoneree applied for a court order to gain access to DNA testing. In at least twenty-four instances, the exoneree obtained testing pursuant to a state statute providing for postconviction DNA testing . . . . In the largest category, however, 119 exonerees (60%) received access to DNA testing through the consent of law enforcement or prosecutors. This finding credits law enforcement for its role in correcting miscarriages of justice. . . . However, in approximately half of the cases law enforcement did not cooperate, at least initially, and the exonerees had to secure DNA testing through other means.[41]

Although the cooperation of law enforcement or of the prosecutor was the most frequent means of obtaining post-conviction testing, the adversarial process did play a useful role: courts granted 60% of the forty judicial petitions of which we know the disposition.[42] Furthermore, it appears the availability of a petition process may have spurred prosecutorial cooperation after initial resistance; where

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[38] Green & Yaroshefky, *supra* note 36, at 506 ("Post-conviction, the prosecutor's role, as a representative of the executive branch, should be viewed even more clearly as administrative, not adversarial."); Medwed, *supra* note 4, at 57–61 (arguing prosecutors should take affirmative action to investigate potential wrongful convictions by establishing "Prosecutorial Innocence Units").

[39] ABA Crim. Just. Section, Report to the House of Delegates 105B (2008).

[40] Garrett, *supra* note 12, at 118.

[41] *Id.* at 119–20 (footnote omitted).

[42] *Id.* at 117, 119 (noting the courts denied testing in sixteen cases and granted testing in twenty-four cases).

the disposition of the petition is unknown, the exoneree likely received access to testing by the consent of the prosecutor.[43]

Although more than half the prosecutors initially resisted DNA testing, it is unlikely the prosecutors who immediately consented were the only ones trying to adhere to their ethical obligations; those who resisted the requests no doubt thought they, too, were doing the right thing.

C. *Factors for Resolving the Issues*

We turn now to the factors relevant to a prosecutor in resolving the inherent conflict that arises with new information that tends—or may tend—to cast doubt upon the verdict in a closed case. No constitutional rule governs a prosecutor's obligation with respect to evidence discovered after trial. The Supreme Court recently ruled that a person convicted in a state court has no right under the Due Process Clause of the Fourteenth Amendment to access DNA evidence for testing.[44] In reaching its holding, the Court rejected the Ninth Circuit's broad view that a prosecutor's obligations under the Due Process Clause extend to the post-conviction context.[45] Although the prosecutor may be subject to some obligations under state law, for the most part his conduct following conviction will be guided only by ethical standards.

Still, the prosecutor's ethical obligation to disclose material, exculpatory information appears straightforward—indeed, deceptively so. The new ABA Rule requires a prosecutor to disclose to the court and to the defendant "new, credible and material evidence" that creates a "reasonable likelihood that a convicted defendant did not commit [the] offense" and to undertake a further investigation based upon this type of evidence.[46] The problem is that after conviction most

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[43] *See id.* at 119–20 ("[L]aw enforcement sometimes consented only after a court . . . was planning to order testing.").

[44] Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2316 (2009).

[45] *Id.* at 2319–20 ("The Court of Appeals went too far, however, in concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect Osborne's postconviction liberty interest. . . . Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.").

[46] MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (2009); *see also* Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976) ("At trial this duty [to disclose material exculpatory evidence] is enforced by the requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."). This standard is quite similar, by the way, to the due process standard that applies before trial. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ."); *see also* United States v. Bagley, 473 U.S. 667, 682 (1985) ("[E]vidence is material only if there is a reasonable probability

conflicts arise with regard to evidence of unknown value. The prime example is untested DNA, but one could imagine a situation in which other information—that does not rise to the level of being "credible and material"—could rise to that level if only further investigation were undertaken.[47] This raises two questions: When does the prosecutor have a duty to disclose evidence that might be exculpatory so that the defendant can undertake his own investigation? And when is the prosecutor obligated to pursue the lead himself?

Although most states now have a procedure for a convicted defendant to petition a court specifically for DNA testing, the prosecutor's response to that request still matters greatly. Of course, the prosecutor may consent to the testing even if the court has denied or surely would deny a petition for testing. The prosecutor alone may make the decision whether to allow testing if the defendant is in one of the three states that has no established statutory procedure to obtain DNA evidence, seeks access to evidence other than DNA in any of the forty-odd states where the established procedure covers only DNA evidence, or is ineligible to file a petition under state law.[48] Likewise in Australia, only New South Wales has a formal mechanism by which a convicted defendant can petition an independent panel for access to DNA evidence; in the other states the defendant is dependent upon the discretion of the local police or prosecutor.[49]

We think there are four main factors the prosecutor should consider when deciding whether he is obligated either to release potentially exculpatory evidence or to undertake his own investigation of it.[50] Using DNA evidence as an example, those factors are: how probative of guilt or innocence the testing may be; whether an adversarial process is available to decide the issue; whether the defense counsel has been diligent; and how costly the DNA testing is.

The most critical consideration is how probative of guilt or innocence the evidence is likely to be.[51] DNA evidence presents the easiest case; often a test result that excludes the convicted defendant as the source of the biological sample would establish with certainty that he did not commit the crime for which he was

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that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

[47] *See* Green & Yaroshefsky, *supra* note 36, at 482 (noting the Model Rule does not "prescribe how to respond when the credibility of new evidence has yet to be evaluated").

[48] *See* Garrett, *supra* note 13, at 1679–82 (noting only six states and the District of Columbia permit non-DNA-related petitions and describing a number of eligibility restrictions states place on DNA-testing petitions).

[49] Weathered, *supra* note 10, at 188–90.

[50] *See generally* Zacharias, *supra* note 36, at 209–14, 226–27 (describing many of the same considerations).

[51] *See* Green & Yaroshefsky, *supra* note 36, at 507 ("The key question, then, is how convinced the prosecutor must be of the defendant's innocence or how doubtful she must be of the convicted defendant's guilt to call for her to rectify an apparent injustice through whatever judicial or executive process is available.").

convicted. In some cases, however, the new evidence—even DNA evidence—is not likely to be conclusive. The states have adopted a variety of standards for determining when the courts should order post-conviction DNA testing. These standards, which can be grouped into four main categories,[52] suggest the different standards the prosecutor also might apply to determine whether he is ethically obligated either to release evidence or to investigate potentially exculpatory evidence.

The majority of states grant DNA testing if there is a reasonable probability the defendant would not have been convicted had an exculpatory test result been presented at trial. The Iowa statute is typical: "The court shall grant the motion if" certain requirements are met and "DNA analysis of the evidence would raise a reasonable probability that the defendant would not have been convicted if DNA profiling had been available at the time of the conviction and had been conducted prior to the conviction."[53] The widespread adoption of this standard likely reflects the availability of federal funds to help defray the costs of post-conviction DNA testing in states that embrace it.[54]

Only a few states have a lower standard, requiring a defendant to show merely that it is likely DNA could be probative of innocence. A small number of states have adopted higher standards, granting a petition to test DNA only if an exculpatory result would more likely than not have resulted in acquittal at trial, only if the defendant shows by clear and convincing evidence that an exculpatory result would exonerate him, or only if "the results of the . . . DNA testing, on its face, would demonstrate the convicted individual's factual innocence."[55] Finally, three states have no statutory procedure by which a defendant can petition for DNA testing.[56]

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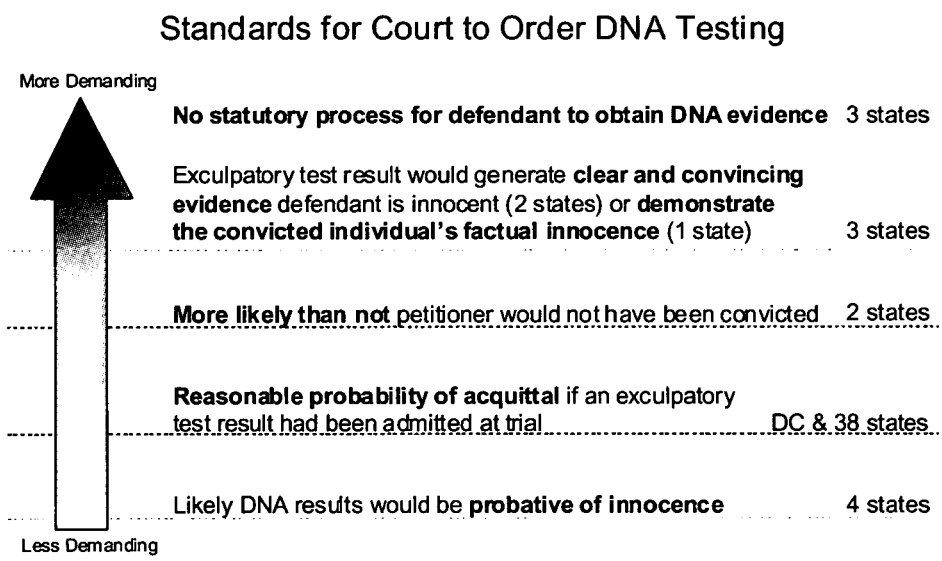
[52] Garrett, *supra* note 13, at 1676–77, app.

[53] IOWA CODE § 81.10(7)(e) (2009).

[54] Justice for All Act of 2004, Pub. L. No. 108-405, § 413, 118 Stat. 2260, 2285 (2004). *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2316 (2009).

[55] *See* ALA. CODE § 15-18-200(a); Garrett, *supra* note 13, at 1676–77, app.

[56] *Osborne*, 129 S. Ct. at 2316, reported that four states had no such procedure, but Alabama has recently passed a statute allowing a defendant convicted of a capital offense to petition for DNA testing. *See* 2009 ALA. LAWS 768 (approved May 22, 2009).



If the prosecutor believes the untested evidence meets the standard under his state's procedure, then surely he is ethically obligated to consent to testing. The question remains, though: If the evidence is not probative enough to meet the state's standard, should the prosecutor release the evidence anyway? That the Model Rule does not address this situation suggests there is no consensus. In view of the asymmetry of the interests involved, the prosecutor may still have an ethical obligation to authorize the testing in a case that does not quite meet the applicable standard, depending upon the other factors canvassed below.

A second, related consideration is whether the state provides a neutral decision-maker to determine whether new testing should be undertaken. Where a defendant's post-conviction claim seeking access to new evidence can be settled by a court, and it is a close question how probative the evidence might be, one might suppose the prosecutor's obligation extends only to ensuring that the defense has all the relevant information so that each side can vigorously advocate its position. In many cases, however, an adversarial proceeding is not available.[57] Where there is no court to decide the issue, again one might want the prosecutor to cede close calls to the defendant.

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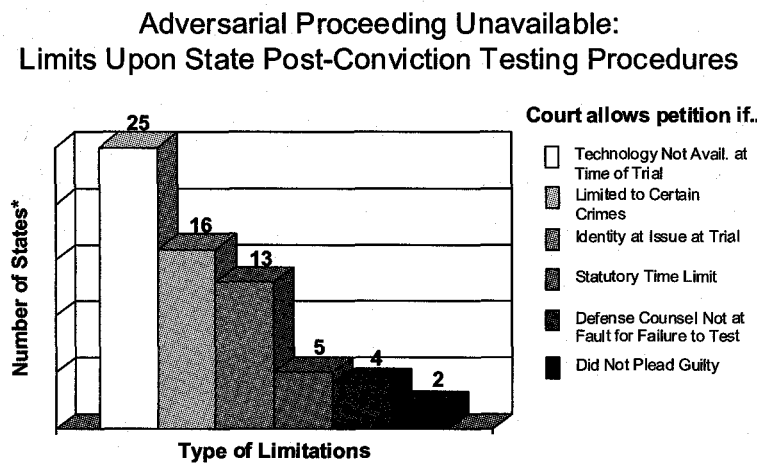
[57] *See* Garrett, *supra* note 13, at 1679–82.



*Some states impose more than one of these limitations.
Source: Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1719-23 (2008)

A third consideration is the diligence of the defense counsel. Many states bar a defendant from petitioning for DNA evidence if his counsel did not request testing at trial, or allow the petition only if the requested testing was not technologically possible at the time of the trial.[58] Because the adversarial process rests upon zealous advocacy, the public interest in maintaining incentives for trial counsel to act diligently is obvious. The defendant may bear a heavy cost as a result, however; the defense attorney failed to request DNA testing at the time of trial in 24% of the 55 cases of exonerees convicted when DNA testing was available.[59] One therefore might still in some circumstances impose upon the prosecutor an ethical obligation to release evidence that could have been discovered before trial—for example, if there is no reason to believe trial counsel's failure to seek testing before trial was a tactical decision rather than an oversight.

Finally, the prosecutor must consider the cost of DNA testing. Currently, testing costs approximately $1,000.[60] The state often pays for the test because the defendant is indigent, but testing imposes additional costs upon the state regardless of who pays the $1,000. Those costs include the diversion of resources from open cases—for which, in most states, there is already a backlog of samples to be

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[58] Garrett, *supra* note 13, at 1681–82, app. (twelve states require testing to have been impossible at time of trial; four do not allow testing if failure to test before trial was due to defense counsel error).

[59] *Id.* at 1658.

[60] Brief for Current and Former Prosecutors as Amici Curiae in Support of Respondent at 10, Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308 (2009) (No. 08-6).

tested[61]—and the need to address false negatives generated when a sample has degraded or a laboratory mishandles and thereby contaminates the sample, a risk that increases with each re-test.[62]

Beyond monetary costs, there is a public interest in finality. Reopening a conviction may mean reopening an emotionally difficult time for the victim. A re-investigation might also intrude upon the victim in more concrete ways; she may, for example, be required to re-submit her own DNA evidence. Insensitivity to such non-monetary costs may prompt a public backlash against reopening claims.[63] These costs weigh against an ethical standard that requires the prosecutor to act where the new evidence is less likely to exonerate the defendant.[64]

III. PROSECUTOR'S OBLIGATION TO SUPPORT REOPENING THE CONVICTION

Of course, granting DNA testing—or pursuing another exculpatory lead—is only a first step. Once a defendant possesses significant new exculpatory information, a prosecutor must determine whether he is ethically obligated to assist the defendant in vacating his conviction. The same four factors we just discussed apply here as well, but particularly important are 1) how probative the collected evidence is of guilt or innocence, and 2) whether an adversarial process is available.

A. *The Pre-Conviction Analogue*

It is useful to compare the post-conviction issue to its pre-conviction analogue. Before conviction the prosecutor is ethically obligated to perform only a limited screening function: he can continue to pursue a case so long as he has probable cause to believe the defendant is guilty.[65] Probable cause does not mean

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[61] NICHOLAS P. LOVRICH ET AL., NATIONAL FORENSIC DNA STUDY REPORT 3 (2003), www.ncjrs.gov/pdffiles1/nij/grants/203970.pdf (estimating that in 2003 there were over 500,000 cases for which possible biological evidence was still in the possession of law enforcement or backlogged at laboratories). Of course, where other forensic testing or investigation is involved, the monetary costs may be more significant.

[62] *See* Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2327–29 (2009) (Alito, J., concurring).

[63] In New South Wales, Australia, for example, an earlier attempt to establish an independent panel to investigate claims of innocence was suspended after it began a reinvestigation of a particularly high-profile crime because, according to the state police chief, it operated without sufficient "checks and balances to protect anyone other than the applicant." Lynne Weathered, *A Question of Innocence: Facilitating DNA-Based Exonerations in Australia*, 9 DEAKIN L. REV. 277, 284 (2004).

[64] Medwed, *supra* note 4, at 50–51; Medwed, *supra* note 27, at 145–46.

[65] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2009).

the defendant is more likely than not guilty,[66] so it is a fairly low standard. Although a prosecutor would not violate the Model Rule by proceeding to trial based only upon probable cause,[67] as a practical matter a prosecutor is more likely to consider whether the court is likely to find guilt beyond a reasonable doubt.[68] The pre-conviction rule is premised in part upon the belief that the prosecutor should not over-exclude cases from the fact-finder's consideration because the adversarial process is the best way to achieve the correct result.[69]

B. *Potential Standards Governing a Prosecutor's Obligation to Support Vacatur*

In the post-conviction setting, the prosecutor continues in practice to serve as gatekeeper to the extent that his response to a motion to reopen a conviction signals something about the defendant's claim of innocence. Of course, the prosecutor cannot vacate the conviction, but he can support the defendant's motion to vacate or for a new trial. Once the conviction is vacated, the prosecutor regains the discretion not to pursue the case.[70] Where statutes or procedural rules preclude judicial relief, the prosecutor can support the defendant's petition for executive clemency.[71] His support for clemency, or for a new trial, can make a significant difference in the outcome.[72]

The ABA Model Rule obligates the prosecutor to "seek to remedy the conviction" when he "knows of clear and convincing evidence" the defendant is innocent. Bruce Green and Ellen Yaroshefsky contend that standard is too demanding; they would require the prosecutor to seek to remedy a conviction if the evidence establishes only that a defendant is more likely than not innocent, regardless of the standard under state law for ordering a new trial.[73] We think it impractical, however, in view of the incentives and biases at work, to obligate the prosecutor as an ethical matter to act upon evidence that does not meet the legal

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[66] *See* Gerstein v. Pugh, 420 U.S. 103, 121 (1975) ("[T]he [probable cause] determination . . . does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands.").

[67] *See* The Comm. on Prof'l Responsibility of the Ass'n of the Bar of the City of N.Y., *Proposed Prosecutorial Ethics Rules*, 61 THE REC. 69, 79–80 (2006) (noting the Model Rule does not address proceeding to trial separately from bringing charges and proposing to prohibit a prosecutor from proceeding to trial if he knows the charge "is not supported by evidence sufficient to establish a prima facie showing of guilt").

[68] *See* Green & Yaroshefsky, *supra* note 36, at 499–500.

[69] *See* Zacharias, *supra* note 36, at 211.

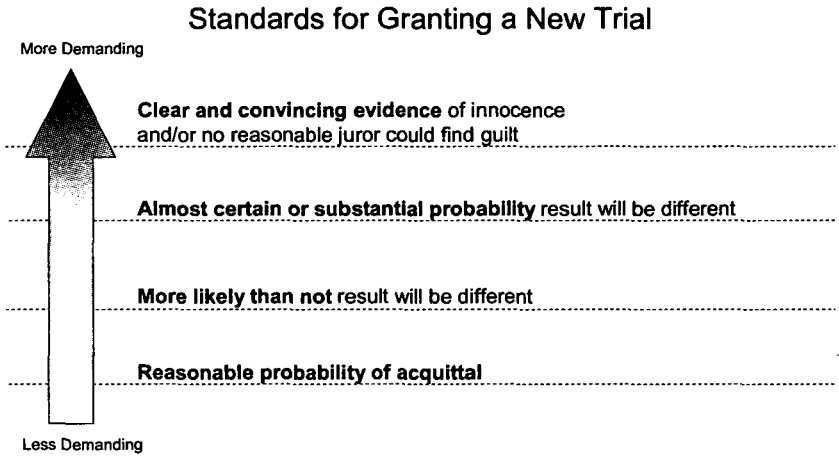
[70] *Id.* at 185–86.

[71] *See* Green & Yaroshefsky, *supra* note 36, at 486–87.

[72] Medwed, *supra* note 4, at 37; Zacharias, *supra* note 36, at 186–87 ("[A] prosecutor's consent to a motion for a new trial may have [a] persuasive effect on a judge making these determinations.").

[73] Green & Yaroshefsky, *supra* note 36, at 507–08.

standard for ordering a new trial. And those standards vary widely—from allowing a new trial if new evidence makes a different outcome probable, to allowing a new trial only if no reasonable juror, considering both the evidence at trial and the new evidence, would find guilt beyond a reasonable doubt.[74]



A second important consideration is the availability of an adversarial process to test the defendant's claim to a new trial. The scope of the prosecutor's ethical obligations before trial is based in part upon the prosecutor not being the final arbiter of truth.[75] So long as the process is fair, and each side zealously advocates its position, one expects the trial to achieve the correct result. Similarly, insofar as the parties can test the factual basis of the defendant's post-conviction claim of innocence in an adversarial process, the prosecutor properly maintains his adversarial role. Green and Yaroshefsky have suggested this is problematic because the courts tend to defer to the prosecutor's assessment of the evidence following conviction,[76] but the solution to that problem—to the extent it occurs—is

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[74] David R. Dow et al., *Is It Constitutional to Execute Someone Who is Innocent (and If It Isn't, How Can It Be Stopped Following* House v. Bell*)?*, 42 TULSA L. REV. 277, 293–321 (2006); Garrett, *supra* note 13, at 1671. Presumably no trial would ensue after a court has determined no reasonable juror would convict.

[75] *See* Green & Yaroshefsky, *supra* note 36, at 501–02 ("Prior to trial, a prosecutor may rationalize that she is primarily a trial lawyer in an adversary process . . . and that primary responsibility for ascertaining guilt or innocence rests elsewhere.").

[76] *Id.* at 502 ("A prosecutor who is personally convinced of the defendant's innocence might nevertheless oppose a new trial motion in order to provide for adversary testing of the evidence and to shift decision making to the court, but the court will not perceive that as the basis for the

not to place a greater obligation upon the prosecutor to act neutrally, but to construct a more robust adversarial process following conviction.

In some cases, however, no adversarial process is actually available because of a statute of limitations.[77] Where an adversarial process is not available for whatever reason, the prosecutor will have to determine whether he is sufficiently convinced of the defendant's innocence that he is ethically obligated to assist the defendant in seeking clemency. It is reasonable to suppose a prosecutor's decision to support a petition for clemency will send a powerful signal to the primary decision-maker—usually a parole board or the governor of the state.[78]

IV. ALTERNATIVE MODELS

As we previously mentioned, the prosecutor's evaluation of the defendant's claim of innocence, and his decision to act upon that evaluation, can make a substantial difference to the defendant's chance of obtaining relief. The difficulty of requiring an adversarial actor to play this kind of non-adversarial role after conviction has prompted one American state and a few other countries to turn to alternative models.[79]

Most American states have hewed to the basic adversarial model to decide post-conviction claims but, in response to DNA-based exonerations, have engrafted onto it more robust post-conviction procedures.[80] Although not linked to DNA-based exonerations, the 1995 amendment of Israeli law to allow a convicted defendant to apply to the Supreme Court for a new trial based upon new evidence that generates "real suspicion" there has been a miscarriage of justice represents a similar judgment regarding the need for a post-conviction adversarial process to decide factual claims of innocence.[81]

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prosecutor's opposition and predictably will defer to the prosecutor's seeming judgment that the defendant is guilty.").

[77] In the states that have them, statutes of limitations range from twenty-one days to three years. Garrett, *supra* note 13, at 1671. This is, however, changing—particularly for DNA evidence. Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 677–78 (2005).

[78] Green and Yaroshefsky, *supra* note 36, at 502.

[79] *See generally* Green & Yaroshefsky, *supra* note 36, at 490–93 (describing developments in North Carolina, the United Kingdom, and Canada).

[80] *See* Garrett, *supra* note 13, at 1673 (noting the dramatic increase in DNA-testing related state statutes over the past decade—from two in 1999 to forty-five in 2008); *see also* Medwed, *supra* note 77, at 677–78 (noting some states have "carved out exceptions to general statutory time limits when new trial motions involve newly discovered evidence" and a few treat claims based upon scientific evidence with greater leniency).

[81] Arye Rattner, *The Sanctity of Criminal Law: Thoughts and Reflections on Wrongful Conviction in Israel*, *in* WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 263, 266 (C. Ronald Huff & Martin Killias eds., 2008); ISRAEL'S COURTS OF LAW AND TRIBUNALS 18 (Aryeh Greenfield trans., A. G. Publications 3d ed. 2005).

Australia has thus far retained a more prosecutor-centered model whereby the Attorney-General of a state can refer a case to the court of appeals upon a defendant's petition for mercy.[82] New South Wales alone has established an independent panel to review applications for post-conviction DNA testing; that panel also has the authority to refer a case to the court of appeals if the panel has a "reasonable doubt" of the defendant's guilt.[83] Only the United Kingdom, Canada, and North Carolina have substantially departed from the adversarial model.

After a number of high-profile exonerations in North Carolina, that state created the Actual Innocence Commission to study the problem of wrongful conviction.[84] The Commission concluded that "neither the appellate nor adversarial process is conducive to postconviction review of claims of innocence."[85] North Carolina therefore established an independent review commission, modeled upon the Criminal Cases Review Commission in the United Kingdom, to screen claims of actual innocence.[86] The eight members of its Innocence Inquiry Commission are appointed by the judiciary but operate independently.[87] Even North Carolina has not completely abandoned the adversarial model, however: The Commission has no authority to vacate a conviction. Instead, if it finds "there is sufficient evidence of factual innocence to merit judicial review," then it refers the case to a special three-judge panel.[88] Before that panel, the parties resume their adversarial roles.[89]

The Criminal Cases Review Commission (CCRC) of the United Kingdom, upon which North Carolina modeled its system, was established in the 1990s after a number of high-profile wrongful convictions in IRA bombing cases came to

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[82] AUSTL. LAW REFORM COMM'N, *supra* note 9, ch. 45.37.

[83] Weathered, *supra* note 10, at 189.

[84] In December 2009, a group of attorneys with the unanimous support of the Florida Bar Board of Governors petitioned the Supreme Court of Florida to create a "Florida Actual Innocence Commission" modeled on the North Carolina Commission. Petition for a Rule Establishing an Actual Innocence Commission at 1, 4 (Fla. 2009), *available at* http://www.floridasupremecourt.org/pub_info/documents/petitions/Filed_12-11-2009_Innocence_Commission_Petition.pdf. The Court has not yet acted upon the proposal. *See* Jan Pudlow, *Board Supports Creation of an 'Actual Innocence Commission'*, THE FLA. BAR NEWS (Feb. 15, 2010), *available at* http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/e0e73244c92ac182852576c1004b88ab!OpenDocument.

[85] Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 654 (2004).

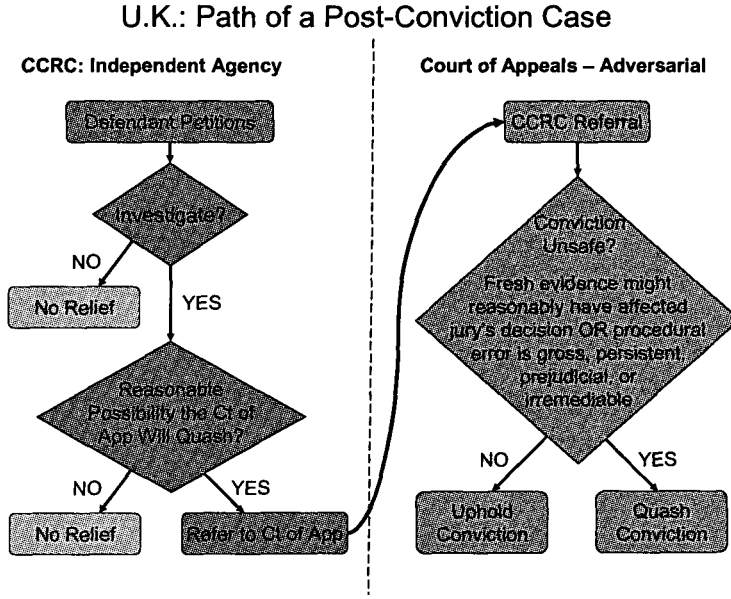
[86] The Commission has referred two cases to the panel; one was rejected, but the other, which did not involve DNA evidence, resulted in exoneration. *See* Robbie Brown, *Judges Free Inmate on Recommendation of Special Innocence Panel*, N.Y. TIMES (Feb. 17, 2010), at A14, *available at* http://www.nytimes.com/2010/02/18/us/18innocent.html.

[87] N.C. GEN. STAT. §§ 15A-1462 to -1463 (2009).

[88] *Id.* § 15A-1469(a).

[89] *Id.* § 15A-1469.

light.[90] Before the CCRC was established, a prisoner had to petition the Home Secretary to refer his case to the Court of Appeal, but the Home Secretary rarely responded favorably to such petitions.[91] Unlike the North Carolina Commission, the U.K. Commission considers claims of procedural error as well as factual innocence, but, absent "exceptional circumstances," the evidence or argument upon which a prisoner bases his petition must be new.[92] The CCRC may refer a case to the Court of Appeal if there is a "real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made."[93]



The CCRC has reviewed 11,100 convictions and referred 426 cases (3.8%) to the Court of Appeal, which vacated the conviction in more than 70% of those

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[90] Stephanie Roberts & Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29 OXFORD J. LEGAL STUD. 43, 48 (2009).

[91] Kate Malleson, *Appeals Against Conviction and the Principle of Finality*, 21 J.L.S. 151, 153 (1994) (noting that the Home Office referred only four or five cases a year out of the 700–800 petitions submitted).

[92] Roberts & Weathered, *supra* note 90, at 49.

[93] Criminal Appeal Act, 1995, c. 35, § 13(1)(a) (U.K.). Upon referral, the Court of Appeal must quash a conviction if it is "unsafe." For a discussion of the two types of "unsafe" convictions, see Stephanie Roberts, *'Unsafe' Convictions: Defining and Compensating Miscarriages of Justice*, 66 MOD. L. REV. 441, 445–50 (2003).

referred (or 2.7% of the total).[94] The experience in the U.K. does not suggest, however, that having an independent body review convictions moots the defendant's need for vigorous post-conviction advocacy; indeed, law schools in the U.K. have recently begun to establish innocence projects modeled upon those in the United States specifically to do the investigative work necessary to convince the CCRC to undertake a searching review of a petition for possible reference to the Court of Appeal.[95]

Canada has adopted a similar system, with a lesser but still significant degree of independence from the prosecuting office. A special task group made up of attorneys in the federal Department of Justice reviews and investigates petitions claiming actual innocence filed by persons convicted in the provincial courts;[96] when a federal prosecution is involved, the Minister of Justice must appoint an outside investigator.[97] If the group or investigator allows the petition, then the Minister of Justice can order a new trial without further action from the courts.[98] In response to charges that the task group was insufficiently independent of the Government, the process was revised in 2002 so that it is governed by more specific guidelines and is overseen by a Special Advisor to the Minister of Justice, who is appointed from outside the Department.[99] The task group also moved out of the Department's offices to a private office building.[100]

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[94] CRIMINAL CASES REVIEW COMM'N, CASE STATISTICS, *available at* http://www.ccrc.gov.uk/cases/case_44.htm (last visited July 2, 2009).

[95] Michael Naughton, *Students for Justice: The Innocence Network*, GUARDIAN, May 8, 2009, *available at* http://www.guardian.co.uk/uk/2009/may/08/innocence-network; Roberts & Weathered, *supra* note 90, at 64–69.

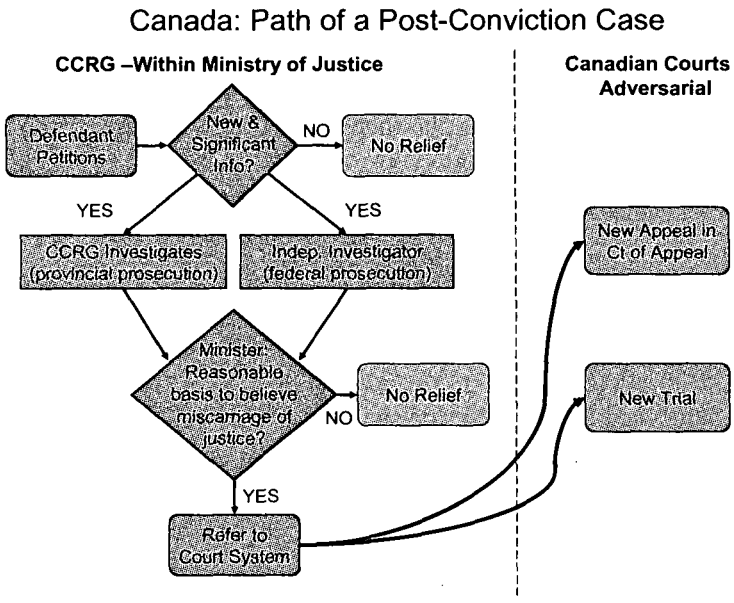
[96] Kerry Scullion, *Wrongful Convictions and the Criminal Conviction Review Process Pursuant to Section 696.1 of the Criminal Code of Canada*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 189, 191 (2004).

[97] CAN. DEP'T OF JUSTICE, ANNUAL REPORT 2008 MINISTER OF JUSTICE: APPLICATIONS FOR MINISTERIAL REVIEW, MISCARRIAGES OF JUSTICE (2008), *available at* http://www.justice.gc.ca/eng/pi/ccr-rc/rep08-rap08/toc-tdm.html.

[98] Scullion, *supra* note 96, at 190–91.

[99] *Id.* at 195.

[100] CAN. DEP'T OF JUSTICE, *supra* note 97.



Although post-conviction relief in the U.K., Canada, and North Carolina is still determined ultimately through an adversarial process, introducing a neutral investigator to initiate that process appears to have been helpful in identifying possibly meritorious claims. According to one report, for example, the CCRC has referred three times as many cases to the Court of Appeal than had the Home Secretary.[101] Even in jurisdictions that do not depart from the adversarial model, however, we think a more robust adversarial system to decide factual questions after conviction would be an improvement over leaving with the prosecutor most of the responsibility for evaluating a defendant's post-conviction claim of innocence.

V. CONCLUSION

To sum up, the wave of DNA-based exonerations has raised awareness that the possibility of a wrongful conviction is real, and as a result has cast serious doubt upon the reliability of the adversarial process and in particular its commitment to err upon the side of acquitting the guilty rather than risk convicting an innocent. Developing an effective corrective mechanism is critical. Although a prosecutor certainly has an ethical obligation to seek justice after conviction, he should not be cast in the role of a neutral minister of justice; it is simply unrealistic

[101] Weathered, *supra* note 10, at 182.

to expect the prosecutor to play that role well. It is likely even more difficult for a prosecutor to play that role well when responding to a post-conviction claim of innocence that relies upon evidence less probative than DNA.

The newly-available procedures created by many states for litigating post-conviction claims of innocence—for example, DNA testing statutes and waivers of statutes of limitations for claims based upon new scientific evidence—provide one solution, by replicating the adversarial process that prevails before conviction and re-introducing a neutral decision-maker into the process. A superior alternative, we submit, is to establish a post-conviction innocence commission that departs much more substantially from the adversarial model. Rather than leaving claims of actual innocence to the prosecutor's sense of justice, these procedures avoid the conflict of interest inherent when the prosecutor is cast in conflicting roles.